(38)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 773

MRS. LORENA MARBRY,

Petitioner,

vs.

GEORGE W. CAIN, AND GARNISHEE, AMERICAN CENTRAL INSURANCE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO SUPREME COURT OF TENNESSEE.

REPLY BRIEF OF MRS. LORENA MARBRY TO ANSWER OF GEORGE W. CAIN.

WILLIAM G. CAVETT,
Attorney for Mrs. Lorena Marbry,
Memphis, Tennessee.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 773

MRS. LORENA MARBRY,

Petitioner,

vs.

GEORGE W. CAIN, AND GARNISHEE, AMERICAN CENTRAL INSURANCE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO SUPREME COURT OF TENNESSEE.

REPLY BRIEF OF MRS. LORENA MARBRY TO ANSWER OF GEORGE W. CAIN.

Since the filing of answer of Cain in this cause admitting on pages 4, 2nd paragraph, page 7, 3rd paragraph, that the "*pertinent inquiry*" of questions for this Court as to dischargeability of judgment depends on the language of the declaration filed in trial court, *August 10, 1940*, and which is quoted on pages 8 and 9 of Petition for Certiorari (R. 5), we ask leave of this Court to file this Reply Brief, sincerely believing it may lesson Your Honor's labors rather than increase same.

The "jugular vein" or "the hub of this case" depends on this language against Cain:

> "The defendant (G. W. Cain) negligently, carelessly and recklessly, after getting into said car, and getting hold of the steering wheel, he managed, operated and directed said car so as to run same over the plaintiff who was using the sidewalk, and public thoroughfare, and while she was guilty of no negligence whatsoever" (R. 5).

This language by the decision of an English Court in *Bromage* v. *Prosser*, 4 Barn. & C. 247, by Mr. Justice Bayley, and *Re Freshe*, 109 Fed. 620, by Judge Kirkpatrick, both of which decisions were quoted and adopted by this Court as fundamentally sound in *Tinker* v. *Caldwell*, 193 U. S. 473, decided 40 years ago, opinion by Mr. Justice Peckham, forever settled the law that:

> "A voluntary act is an intentional one."
> "Intentionally" means "wilfully".
> 2 Bouvers L. Dict. 656. Northern Rr. Co. *v.* Carpenter, 13 How. Pr. 22.

In the *Tinker* case, *supra*, the Court pointed out in this clear language:

> "The act of Freche which caused the injury was wilful, because it was voluntary. The act was unlawful, wrongful, and tortious, and being wilfully done it was, in law, malicious." 193 U. S. 486.

The fundamental error of Tennessee courts, and also of opposing counsel, is not fundamentally applying "malice in law" as defined, but in applying "malice in common acceptation". This Court has said:

> "Malice, in common acceptation, means ill-will against a person; but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse." 193 U. S. 486.

Applying these fundamental rules of law to the facts in this case, did not G. W. Cain act voluntary and wilfully when he after:

1. "getting into said car"

2. "getting hold of the steering wheel"

3. "he managed" (the car so as to run over plaintiff who was using the sidewalk)

4. "operated" (said car so as to run over plaintiff who was using the sidewalk)

5. "directed" (said car so as to run over plaintiff who was using the sidewalk)

These *five* acts were *voluntary* on the part of George W. Cain and therefore *wilful*, and intentional, and these acts were unlawful, wrongful, and tortious, and being wilfully done, they were, in law, malicious.

In the *Tinker* case this Court said:

> "If he intentionally did drive over him, it would certainly be malicious." 193 U. S. 489.

This important fact was omitted by opposing counsel in answer, page 10 in 4th paragraph. Then applying this in this *Marbry* case:

> If (George W. Cain) intentionally did drive over her (Mrs. Marbry) it would certainly be malicious.

Then we have this confessed, adjudicated charge as true:

> The defendant (George W. Cain) after getting into said car, and getting hold of the steering wheel, he managed, operated, and directed said car so as to run over the plaintiff who was using the sidewalk, and public thoroughfare, and while she was guilty of no negligence whatsoever, and causing her to be injured.

If George W. Cain had thrown a brickbat out his window onto the sidewalk and brained Mrs. Marbry, would this have been a voluntary, intentional, wilful and malicious act?

Applying the fundamental rules of law announced in the *Tinker* case in *McIntyre* v. *Kavanaugh*, 242 U. S. 138, which was a suit for conversion of stock hypothecated, the Court said of this sale that it was:

> "without notice to plaintiff and without his authority, knowledge or consent or demand of any kind upon him, sold and disposed of the identical stocks * * * and placed the avails thereof in the bank account of said firm."

This was of course applying those fundamental rules that the acts of the partners was *voluntary* and therefore *intentional* and *wilful*, and then when the *proceeds* of the sale were *deposited in the firm's bank account*, this was unlawful, wrongful and tortious, and being wilfully done, it was, in law, malicious.

Tennessee courts before this *Marbry* case held:

> "A voluntary act is an intentional one."
> Union Casualty Co. *v.* Harrold, 98 Tenn. 593, 596;
> Mutual Ins. Co. *v.* Distretti, 159 Tenn. 138.

Seventy years ago the Supreme Court said:

> "A sane man may be punished by vindictive damages for his acts."
> Ward *v.* Conatser, 63 Tenn. 66.

In *Tel. & Tel. Co.* v. *Shaw*, 102 Tenn. 313, 319, the Court pointed out that in the *Poston* case, 10 Pick. 696, sustaining vindictive damages, held,

> "There was only gross negligence in not getting permission from the true owner."

Mr. Justice McFarland who delivered this opinion has been said by the Bar of Tennessee to have been "Tennes-

see's most just judge." The fact that the telegraph company did not get permission to cut the limbs from the trees from the true owner was held to be a voluntary act and therefore a wilful act and would not have been dischargeable as defined in the *Tinker* and *McIntyre* cases in which the Court said:

> "A wilful disregard of what one knows to be his duty, an act which is against good morals and wilful in and of itself, and which necessarily causes injury, and is done intentionally, may be said to be done wilfully and maliciously so as to come within the exception." 193 U. S. 473; 242 U. S. 138.

And Chief Justice Magruder defined the word "reckless" as follows:

> "The word 'reckless' implies heedlessness and indifference."
>
> Lakeshore and M. S. Rr. Co. *v.* Bodemer, 139 Ill. 596;
>
> 29 N. E. 697, 32 Am. St. Rep. 218.

Lauterback was found guilty of felonious homicide while operating an automobile "recklessly" in violation of 30 miles per hour statute in Tennessee, 132 Tenn. 63, 65.

Therefore by the law that has been announced in English and Federal courts and also in Tennessee courts, Cain's acts were voluntary, and therefore intentional and wilful and being wrongful, unlawful and tortious, and being done intentionally his acts resulted in injury and are not dischargeable in bankruptcy under Section 17.

The statistics made up by the insurance companies of America show that more persons are injured and killed yearly by automobiles than are injured or killed in our armed forces scattered all over the world and aggregating

some eight million persons in two and one half years of wa
We can conceive of no superior right or "special dispens
tion" to those who commit voluntary, intentional and wilf
injuries by automobiles.

WILLIAM G. CAVETT,
Attorney for Mrs. Lorena Marbry,
Memphis, Tennessee.